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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR ALEXANDER McCALL,

Defendant and Appellant.

C071012

(Super. Ct. No. 09F09164)

A jury convicted defendant Arthur Alexander McCall of first degree murder, and found, as sentence enhancements, that he intentionally discharged a firearm to cause the death and that he committed the offense for the benefit of a criminal street gang. (Pen. Code, §§ 187, subd. (a), former 12022.53, subd. (d), 186.22, subd. (b)(1).)¹

Sentenced to 25 years to life for the murder, an additional 25 years to life for the firearm finding, and an additional 10 years for the gang finding, defendant appeals. He

¹ Undesignated statutory references are to the Penal Code.

contends the trial court (1) violated his confrontation and due process rights by admitting into evidence a videotaped police interview of a witness with a third person present who influenced the witness, (2) erred in failing to ascertain juror information regarding alleged juror misconduct and prosecutorial misconduct, (3) erred in imposing the 10-year gang enhancement, and (4) found, without sufficient evidence to do so, that he had the ability to pay a jail booking fee and a jail classification fee totaling just over \$320. We agree the 10-year gang enhancement sentence must be stricken, but otherwise we shall affirm the judgment.

FACTUAL BACKGROUND

Events Prior to the Shooting

On November 21, 2008, Shaniece Hill drove her boyfriend, Jonah Simms (with whom she had just argued; and the victim here), and Simms's friend, David Loria (Loria), to a two-story apartment complex on Bowles Street in Sacramento, dropping them off around 8:00 or 9:00 p.m.

Once dropped off, Simms called a friend to retrieve him and Loria. When the friend returned Simms's call for directions, she heard "Nigga, I'm just saying" in the background; the phone hung up, and no one answered when the friend made further calls.

Louanne Bower, a resident of the Cancun Apartments on Bowles Street, was returning to her apartment on the evening of November 21, 2008, when she saw several people outside the complex and defendant in the bushes outside the Cancun apartment of his girlfriend.

The Shooting

Bower, about five or 10 minutes after she got inside her apartment, heard six or seven gunshots. When Bower and her roommate went outside to see what happened, Toni Morgan (Morgan), defendant's girlfriend, called them over and asked them to hide

some bullets for her.² Bower and her roommate refused; Bower was on parole at the time.

Morgan admitted to law enforcement that, after the shooting, she got rid of some bullets in her apartment. At trial, she testified she did not remember anything about the night of the shooting or about what she told law enforcement; at trial (in November 2011), she still considered herself defendant's girlfriend. Detective Bryce Heinlein, the investigating officer in this case, testified that Morgan told him she first tried to give the bullets to a female apartment neighbor, who refused; then she put them under a nearby bush—the bullets were gold-colored, but she did not know the caliber.

Loria, the victim Simms's friend, testified that, at the time of the shooting, he and Simms were Nogales Gangster Crips. As for the shooting, after the two of them were dropped off by Hill, Simms was on the phone until they reached the Cancun Apartments. While on the phone, Simms was loud, mad and saying "cuz" a lot; "cuz" means "dude" in Crip lingo, but is offensive if spoken to a Blood gang member one does not know. Loria knew the area was more Blood territory than Crips.

While Loria and Simms were walking, a man approached Loria with his hand in his pocket. Loria touched the man's chest to get past. After getting off the phone, Simms confronted the man; words were exchanged; and then the man shot Simms. More than one shot was fired. Loria was inconsistent regarding his description of the assailant and regarding his cooperation with the police; testifying for the defense at trial, he acknowledged testifying at the preliminary hearing that defendant was not the shooter.

² Morgan and defendant had been together for three years in November 2008; they both lived at the Cancun Apartments, but not together; defendant sometimes stayed over at her apartment.

Simms died of two gunshot wounds to the chest. The bullets were copper-jacketed “[n]ominal .32 caliber,” a caliber description that describes a whole family of cartridges that share the same basic bullet diameter.

The McCulloch Set of Witnesses

Doris McCulloch (McCulloch) lived at the Cancun Apartments with her sons, Kenneth Rochelle (Rochelle) and Michael Wiley (Wiley), and her longtime boyfriend, Avery Kennedy (Kennedy). McCulloch’s daughter, Tashawana Wiley (Tashawana), also lived at the complex, in a different apartment, along with her boyfriend, Deandre Zachary (Zachary), and their child.

About a year after the shooting, during a police search in December 2009, Zachary was arrested on a drug sale charge, Wiley was arrested on an outstanding warrant, and Tashawana was cited for misdemeanor child endangerment.

After being arrested, Zachary told the police he had information about the November 21, 2008 homicide at the Cancun Apartments. After Zachary informed Detective Heinlein that the officer really needed to talk to someone else, Heinlein questioned Rochelle.

During Detective Heinlein’s initial questioning, the 16-year-old Rochelle was uncooperative and seemed dishonest. Heinlein then had Zachary, who was 29 years old, join them and tell Rochelle it was okay to tell the truth. Once Zachary was present, Rochelle explained to Heinlein that defendant, on the night of the shooting, was outside the apartment complex when Rochelle arrived home.³ Defendant told Rochelle that he had “got into it with somebody,” and that he was waiting for them to walk past; when the two of them did, defendant followed them. Just after defendant walked off into the

³ Part of Detective Heinlein’s interview of Rochelle, when Zachary was present, was recorded, transcribed, and played for the jury.

parking lot and approached the two, Rochelle heard three or four gunshots. With Zachary's prodding, Rochelle identified defendant from a photo lineup as the shooter, although he did not see the actual moment of firing.

At trial, Rochelle claimed this account to Detective Heinlein was false, and that Zachary had pressured him to say this to protect Zachary's girlfriend and Rochelle's sister, Tashawana.

Wiley told Detective Heinlein, in a videotaped and transcribed interview played for the jury, that after he (Wiley) heard two gunshots, Rochelle returned to the McCulloch apartment and stated that defendant "just shot [a] dude" for bumping into defendant and saying "cuz." Apparently, after the "cuz" statements, defendant went to his apartment, got a gun, and then shot the victim. Wiley informed Heinlein that defendant was affiliated with the Oak Park Bloods.

At trial, Wiley testified that whatever he told law enforcement was just to help his sister, Tashawana, and that Zachary told him what lies to say.

Kennedy, McCulloch's boyfriend, told Detective Heinlein that, two days before the shooting, he bought some bullets for defendant, and defendant gave him \$20 for his efforts; Heinlein determined that Kennedy had purchased .32-caliber bullets.

The McCulloch set of witnesses—Rochelle, Wiley, and Kennedy—testified under a grant of use immunity.

Gang Expert Testimony

A detective gang expert opined that defendant was a member of the Oak Park Bloods, that Simms was a member of the Nogales Gangster Crips, and that this homicide was committed for the benefit of the Oak Park Bloods.

DISCUSSION

I. The Admission into Evidence of Rochelle's Videotaped Police Interview (with Zachary Present) Did Not Violate the Confrontation Clause or Due Process

Defendant contends the trial court: (1) violated his constitutional right to confront Zachary, who was not available for trial, when the court admitted into evidence the videotaped interview between Detective Heinlein and Rochelle after Zachary joined the interview and participated in eliciting statements from Rochelle (hereinafter, Rochelle's videotaped interview); and (2) violated due process, in the process.

A. Confrontation Clause

As noted, Detective Heinlein testified at trial that the 16-year-old Rochelle was uncooperative—and Heinlein thought dishonest—during initial questioning. The detective then had Zachary, who was 29 years old, join them and tell Rochelle it was okay to tell the truth. In Rochelle's videotaped interview, Rochelle, with Zachary's prodding, identified for Heinlein that defendant was the shooter (as set forth in the Factual Background of this opinion under the subheading, "*The McCulloch Set of Witnesses*").

No statements from Zachary were admitted into evidence (given his unavailability at trial), except for (i) his communications during Rochelle's videotaped interview, and (ii) Detective Heinlein's testimony that Zachary told him he (Heinlein) really needed to talk to someone else (i.e., this statement from Zachary was admitted for the nonhearsay purpose of explaining what the police did next, which was to contact Rochelle).

The confrontation clause in the federal Constitution's Sixth Amendment guarantees a defendant the right to confront those "who 'bear testimony' " against him. (*Crawford v. Washington* (2004) 541 U.S. 36, 51 [158 L.Ed.2d 177, 192].) A "testimonial" statement subject to the confrontation clause is typically a formal

declaration or affirmation made for the purpose of establishing some fact; it includes police interrogations. (*Crawford*, at pp. 51, 68 [158 L.Ed.2d at pp. 192, 203].)

Defendant contends that admitting into evidence Rochelle's videotaped interview denied defendant his right to confront Zachary in two ways: (1) this evidence conveyed to the jury that Zachary had also told Detective Heinlein that defendant killed Simms, via Heinlein confronting Rochelle with what Zachary had told Heinlein; and (2) defendant could not confront Zachary about his motivations for telling this story and pressuring Rochelle to match it.

With respect to defendant's first point, defendant notes from Rochelle's videotaped interview that "Rochelle looks at [Zachary] before identifying [defendant] as the person he encountered [while] at the apartment. Zachary is looking back and forth at Rochelle and then Detective Heinlein. Heinlein looks at Zachary and says what Rochelle is telling is different from what [Zachary] said. Zachary says, 'I know' and shakes his head. At various times, Zachary appears to be 'coaching' Rochelle."⁴

The quoted part above that most supports defendant's first point about not being allowed to confront Zachary's accusation against him is: "Heinlein looks at Zachary and says what Rochelle is telling is different from what [Zachary] said. Zachary says, 'I know' and shakes his head." However, the transcription of Rochelle's videotaped interview (a transcription the jury had) provides the following backdrop with respect to this interchange:

⁴ During Zachary's interview with Detective Heinlein (not admitted into evidence) Heinlein questions Zachary whether Rochelle will tell the truth if the detective brings Zachary into the Rochelle interview room. During the initial part of the Heinlein-Rochelle videotaped recording (not played for the jury), Zachary tells Rochelle that he (Zachary) told Heinlein a story, and that Heinlein has to get Rochelle's story, and the stories have to match, or they are just bullshitting and railroading Heinlein and their deal is nothing.

“[ROCHELLE]: I was still on the [apartment] stairs [outside]. [Defendant] walked downstairs. [Defendant] walked out the [apartment] back gate and . . . then I heard pow, pow, pow, pow. [¶] . . . [¶]

“[DET. HEINLEIN]: So you didn’t walk out—

“[ROCHELLE]: No.

“[DET. HEINLEIN]: —down the street with [defendant]? Sure? ’Cause that’s a little different from what [Zachary] said.

“[ZACHARY]: I know. I went in the house [i.e., inside his apartment]. I thought [Rochelle] went—

“[ROCHELLE]: [Zachary] wasn’t—he was never outside.”

Thus, the passage on which defendant most relies to claim he was denied the right to confront Zachary’s accusation against him, actually lays waste to much of that argument. Zachary is uncovered, not as an independent accuser regarding the shooting, but as someone who did not know much of what occurred. Zachary was inside his apartment, tucked away from what was happening outside; instead of Zachary having “inside” knowledge, he had its opposite—“inside” ignorance. Furthermore, this interchange confirms Zachary’s nonhearsay statement to Detective Heinlein that the detective really needed to talk to someone other than Zachary. As for Zachary’s supposed “coaching” of Rochelle, such “coaching” does not appear in Rochelle’s videotaped interview.

When we combine this analysis with the recognition that no other “testimonial” facts from Zachary were admitted into evidence, we conclude that defendant’s first point lacks merit.

That brings us to defendant’s second point regarding confrontation: He was denied the opportunity to confront Zachary about his motivations for telling a story and

pressuring Rochelle to match it. But defendant's own words defeat this claim. In his opening brief, defendant states: "At trial, Rochelle testified that everything he told [Detective Heinlein] was a lie. . . . [¶] . . . [¶] Rochelle repeatedly testified that it was Zachary's idea to make up a story identifying [defendant] as the shooter to save Zachary and, more importantly, Zachary's girlfriend who was Rochelle's sister [Tashawana], from going to jail for the drug bust [in] December [2009]." Thus, Rochelle repeatedly disclosed Zachary's motivations; and, in any event, as we have seen, Zachary's own purported accusation against defendant had little or no basis in the evidence before the jury.

B. Due Process

As defendant eventually concedes in his reply brief, his argument that Rochelle's videotaped interview violated defendant's due process right to a fair trial, rests on the foundation of the confrontation clause. Given that we just undercut that foundation, the related due process argument crumples as well.

II. The Trial Court Did Not Err in Failing to Ascertain Juror Information Regarding Alleged Juror Misconduct and Prosecutorial Misconduct

We will start with the juror misconduct issue.

A. Juror Misconduct

Defendant contends the trial court erred in failing to examine the jurors and alternates, after the verdict, as to what they knew about one juror supposedly telling another early in the trial that defendant was "guilty." We disagree.

About two months after the verdict, defendant moved for the disclosure of sealed juror personal identifying information (i.e., juror contact information) to prepare a motion for new trial based on juror misconduct. In support of the motion, defendant's mother declared that she overheard the "guilty" remark.

Initially, the trial court found that defendant, based on his mother's declaration, had made a prima facie showing of good cause to release the sealed information, and ordered that jurors be notified of the information request and given a chance to object. (See Code Civ. Proc., §§ 206, 237, subds. (b)-(d) [governing the process by which parties may seek juror contact information; disclosure requires good cause].) When most of the jurors who responded to the notice objected to the release of their personal contact information, the trial court refused to release the information to the defense, but noted it was willing to set the matter for further hearing for the two jurors who had agreed to be interviewed.

Defendant then moved the trial court to order all jurors to appear in court for court questioning. The trial court denied the motion (eventually framed as a motion for new trial), finding that it would contravene the jurors' statutory privacy rights (Code Civ. Proc., §§ 206, 237), and that there was insufficient evidence of juror misconduct because defendant's mother's declaration lacked credibility; the court noted that the mother's declaration was inconsistent with her reaction of incredible surprise at the verdict and with conversations she had with defendant. There was evidence that defendant and his mother had several (transcribed) jail phone conversations during the trial, but never mentioned any improper juror comment. Furthermore, none of the several jurors who were contacted corroborated the "guilty" comment.

Relying on a decision from this court, *People v. Tuggles* (2009) 179 Cal.App.4th 339 (*Tuggles*), defendant contends the trial court misunderstood its discretion to contact the jurors *itself* to investigate juror misconduct *on its own*, rather than having the parties do so.

In *Tuggles*, we observed, "[C]ode of Civil Procedure sections 206 and 237 allow jurors to prevent the release of [personal identifying] information to parties, their attorneys, investigators working for counsel, and members of the general public. The

court must heed the wishes of reluctant jurors to bar disclosure of [this] information to these persons. However, Code of Civil Procedure sections 206 and 237 do not infringe upon the trial courts' inherent power to investigate strong indicia of juror misconduct. [Citation.] Jurors may not thwart an investigation of misconduct by the court itself. The trial court has discretion to subpoena even reluctant jurors when necessary to determine whether the factfinding process went awry. [Citation.] Accordingly, the [*Tuggles*] trial court . . . erred by concluding that it had no power to order jurors to attend an evidentiary hearing after they declined to discuss the case *with counsel*. The duty to protect jurors from overzealous attorneys and investigators does not require an abdication of the court's obligation to ensure that the jury trial process is free from misconduct." (*Tuggles, supra*, 179 Cal.App.4th at pp. 386-387.)

Based on these observations, we concluded in *Tuggles*, "Thus, where the trial court is presented with a credible prima facie showing that serious misconduct has occurred, the trial court may order jurors to appear at a hearing and to answer questions [from the court] about whether misconduct occurred." (*Tuggles, supra*, 179 Cal.App.4th at pp. 385-386.)

Here, however, as the trial court implicitly concluded, defendant did not present it "with a credible prima facie showing that serious misconduct ha[d] occurred." (*Tuggles, supra*, 179 Cal.App.4th at pp. 385-386.) As the trial court noted, there was insufficient evidence of serious juror misconduct, given that defendant's mother's declaration lacked credibility and not one of the several jurors who were contacted corroborated the "guilty" remark.

In two respects, defendant disputes a conclusion that the trial court properly refused to examine the jurors *itself*. First, defendant notes the trial court *did* initially find that defendant had made a prima facie showing of juror misconduct, based on defendant's mother's declaration. And, second, defendant argues that such a conclusion improperly

mixes two different claims: (1) trial court error in denying a motion for new trial based on juror misconduct; and (2) trial court error in misunderstanding it had discretion to examine jurors itself to investigate the basis for a new trial motion grounded on juror misconduct. Both of defendant's disputes, however, fall prey to the fact that defendant did not make the threshold showing required to trigger *a trial court's* examination of jurors: a *credible* prima facie showing that *serious* misconduct had occurred.

B. Prosecutorial Misconduct

Defendant also contends the trial court erred in denying his motion for juror contact information to investigate whether the prosecutor's conduct toward the victim's mother invoked sympathy, thereby improperly influencing the jury's deliberations. According to defendant, the prosecutor repeatedly exposed the jurors to the victim's mother by having the mother sit just outside the courtroom where the jurors congregated during breaks and by comforting the mother in front of the jurors by rubbing her shoulders and demonstrating her sympathy.

For two reasons, we conclude the trial court properly found that defendant failed to establish the requisite "good cause" for the release of juror contact information, pursuant to a motion defendant made about two months after the verdict. (Code Civ. Proc., § 237, subd. (b).)

First, to preserve a claim of prosecutorial misconduct for appeal, a defendant must have timely objected and requested the trial court to admonish the jury. (*People v. Ayala* (2000) 23 Cal.4th 225, 284.) We realize defendant's contention here involves but a step on the way to establishing a claim of prosecutorial misconduct. Nevertheless, had defendant timely objected to the prosecutor's alleged repeated exposures and requested the jury be admonished, this would have cured any harm at trial and we would not be entertaining this contention now. Under the circumstances here, granting defendant's motion for juror contact information would allow a defendant to sit upon a claim of

prosecutorial misconduct involving improper jury influence and then obtain juror contact information after an adverse verdict; this would allow the disclosure of such information through the back door, which could not be obtained through the front.

Second, the trial court instructed the jurors not to let sympathy influence their decisions; and to disregard anything they saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

III. The 10-year Gang Enhancement Sentence Must be Stricken

Defendant contends the judgment must be modified to strike the 10-year gang enhancement sentence imposed under section 186.22, subdivision (b)(1)(C). The People agree. So do we.

As this court stated in *People v. Louie* (2012) 203 Cal.App.4th 388, 396, “ ‘Penal Code section 186.22, subdivision (b) establishes *alternative* methods for punishing felons whose crimes were committed for the benefit of a criminal street gang.’ [Citation.] Because section 186.22, subdivision (b)(1) authorize[s] imposition of an enhancement ‘[e]xcept as provided in paragraphs (4) and (5),’ ‘the gang enhancement under section 186.22, subdivision (b)(1) may not be imposed when subdivision (b)(4) or (b)(5) applies instead.’ ”

Given that defendant’s section 186.22, subdivision (b)(1)(C) gang enhancement was imposed for his conviction for first degree murder (§ 190, subd. (a)—a 25-year-to-life term), subdivision (b)(5) of section 186.22 applies here instead of subdivision (b)(1)(C). Subdivision (b)(5) states that “any person who violates . . . subdivision [(b)] in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.”

**IV. Defendant Has Forfeited His Claim Regarding Fees;
in Any Event, Any Error Was Harmless**

Defendant contends there is insufficient evidence to support the trial court's implied finding that defendant had the ability to pay a main jail booking fee of \$270.17 and a main jail classification fee of \$51.34, imposed pursuant to Government Code section 29550.2.

Defendant has forfeited these contentions because he failed to raise them at sentencing. (*People v. McCullough* (2013) 56 Cal.4th 589, 591, 598-599; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357.)

In any event, any error in this regard was harmless here. The challenged fees total \$321.51, payable through the court's installment process. As modified on appeal, defendant's sentence is 50 years to life. He is a young man. There is sufficient evidence that he will be able to pay off this amount through prison work wages.

DISPOSITION

The judgment is modified to strike the 10-year gang enhancement sentence imposed under section 186.22, subdivision (b)(1)(C). As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to send a certified copy of it to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MAURO, J.